impounded by the court below is a Singapore passport issued by the Government of the Republic of Singapore. In my opinion, if the court decides that one of the conditions of bail is to require that the accused surrenders his passport, it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a passport issued by a foreign government. Before our court, no one is to be treated differently. Under the Federal Constitution, all persons are equal before the law and entitled to equal protection of the law (Article 8(1)).

The question for the court to consider now is whether the order of the court below impounding the applicant's passport forms one of the conditions of bail. In order to answer this question, it is necessary to examine the meaning of the word "impounded". According to the *Oxford English Dictionary*, the word "impound" means "to seize or secure by legal right; to take legal or formal possession of (a document or the like) to be held in custody of the law". *Stroud's Judicial Dictionary of Words and Phrases*, 5th Ed., states: "A document is impounded when it is ordered by a court to be kept in the custody of its officer." It is clear from these definitions that when a document is impounded, it is ordered or compelled by the court to be kept by its officer and the court makes the order under the authority of the law.

In the instant case, the court ordered that the passport be impounded. The order was certainly not one of the conditions of bail. Therefore, the order made by the court below in respect of the passport did not fall within the scope of section 388 of the Criminal Procedure Code.

The question now is whether the court below had the authority to impound the passport under any other law. The only relevant law is the Malaysian Passports Act 1966 (Revised – 1974). But this Act does not contain any provision empowering the court or the government to impound a passport.

In the absence of any law empowering the court below to impound the applicant's passport, the order made by the learned Sessions judge was not a valid order. Indeed, such an order amounts to punishing the applicant without the authority of the law.

I accordingly set aside the order of the learned Sessions judge with regard to the impounding of the applicant's passport and order that the passport be returned to the applicant forthwith.

Order accordingly.

Solicitors: *Lawrence Dhillon & Associates.*

SARI ATLANTIC SDN. BHD. v. AIK KIM ENTERPRISE

[O.C.J. (Lim Beng Choon J.) July 16, 1987]

[Alor Setar – Company Winding Up 42-01-87]

Companies and corporations – Winding up – Petition for – Non-compliance with rule 26 of the Companies (Winding Up) Rules 1972 – Whether fatal to petition – Whether curable by court – Companies Act (Act 125), s. 221(2).

A petition was presented to the court to wind up the respondent company. However, the affidavit verifying the petition was affirmed about four days before the presentation of the petition itself, which was a clear failure to comply with rule 26 of the Companies (Winding Up) Rules 1972. At the hearing of the petition, the respondent company contended that the non-compliance was a fatal defect and that the petition must be rejected as this court had no power to cure such a defect.

Held: (1) in this case, none-compliance with rule 26 does not render the petition a nullity and is curable by the court;

(2) section 221(2) of the Companies Act allows the court to cure a technical error which does no injustice to the respondents.

Cases referred to:

(1) *Chin Yoon Timber Co.* v. *Overseas Lumber Bhd.* [1978] 2 M.L.J. 173.

(2) *The Western Benefit Building Society* 55 E.R. 409; (1864) 33 Beav. 368.

(3) *Sam Hin Timber Co.* v. *Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 C.L.R. 269.

WINDING-UP PETITION.

Mdm. Poh Ah Leng for the petitioner.

Francis Nather for the respondent.

Cur. Adv. Vult.

Lim Beng Choon J.: A petition for the winding up of Aik Kim Enterprise Sdn. Bhd. (hereinafter referred to as the Company) was presented

to this court on February 15, 1987, but the affidavit verifying that petition was affirmed on February 10, 1987, *i.e.* about four days before the presentation of the petition itself, which is a clear failure to comply with rule 26 of the Companies (Winding Up) Rules 1972. Notice of intention to oppose the petition was filed by the Company on June 25, 1987. At the hearing of the petition on June 27, 1987, the main objection of the learned counsel appearing on behalf of the Company was that the consequence of the non-compliance with rule 26 of the Companies (Winding Up) Rules 1972 was a fatal defect and that the petition must be rejected as this Court had no power to cure such a defect. In support of his contention the learned counsel relied on the case of *Chin Yoon Timber Co.* v. *Overseas Lumber Bhd.*[1] In that case the affidavit veryfying the petition was sworn on May 4, 1977 ("first affidavit") but the petition was not presented or filed in the Court until May 17, 1977 (some 13 days later). At the hearing of the petition the learned counsel for the respondent company against which the petition for winding up was made ("the respondent") objected to the petition whereupon His Lordship allowed an adjournment to enable counsel on both sides to look up authorities in order to enable them to argue further. Before the resumed hearing of the petition the petitioning company ("the petitioner") took the opportunity to file another affidavit verifying the petition ("second affidavit"). On the resumption of the hearing of the petition the learned counsel for the respondent contended that the second affidavit could not cure the defect resulting from the original presentation of the petition when it failed to comply with the provisions of rule 26 of the Companies (Winding Up) Rules 1972 which he argued were mandatory and non-curable by rule 193 or 194. His Lordship held, and with due respect quite correctly, that since the first affidavit was conceived before the (presentation) of the petition the question of extension did not arise. As regards the second affidavit it appears from the judgment that His Lordship rejected it because the filing of the second affidavit was nothing more than a indirect way of attempting to cure the defect created by the first affidavit. In effect the filing of the second affidavit affirmed that the first affidavit was a complete nullity. In my review of the judgment of the *Chin Yoon Timber* case I did take into consideration that the learned judge to some extent relied on the English authority *The Western Benefit Building Society*[2]. Unfortunately I am not able to get hold of that report as the English Reports are not available in this court. In any case it appears to me that the *ratio decidendi* of His Lordship's judgment rests solely on the principle that one could not by the first affidavit verify to an unborn petition and that rule 193 could not apply to the said affidavit as it could not verify to something which in the eyes of the law was not yet in existence. His Lordship then went on to hold that as the petitioner failed to comply with rule 7 of the 1972 Rules in filing the second affidavit, this affidavit could not be accepted. However that may be I can find some assistance from a digest of that authority appearing in the *English and Empire Digest* Replacement Volume 10 1975 reissue at page 959 case 5667 where it is stated as follows:

> "An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual *and it must be resworn* before an order can be made on the petition." (Emphasis is mine)

From this very short report it appears to me that the non-compliance with the said rule 26 in the present case does not render the petition a nullity and it is curable by this court. Another authority which is of assistance to me can be found in the same volume of the *English and Empire Digest* at the same page case no. 5668 where it was held, *inter alia,* that the court would under proper circumstances order the winding up of a company although the affidavit in support of the petition was not filed within the four days required by the General Orders of November 1862 (revoked).

A similar approach was followed in the case of *Sam Hin Timber Co.* v. *Perusahaan Sri Duyong Sdn. Bhd.*[3] There it was held that a premature swearing or affirming of an affidavit verifying the petition was a mere irregularity curable by the granting of an extension of time and compensating the victim with costs. From these three authorities I am therefore of the view that besides the discretionary power given to this court under the said rules 193 and 194, the Companies Act itself under the provisions of section 221(2) which read as follows:

> "The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company or any person who has given notice he intends to appear on the hearing of the petition
>
> (a) [not applicable]
>
> (b) dispense with any notices being given or steps being taken which are required by this Act or by the rules or by any prior order of court

(c) [not applicable]

(d) [not applicable]

(e) allow the petition to be amended or withdrawn and

(f) give such direction to the proceedings as the court thinks fit and also confer on this court the power to cure any irregularities that would not cause any injustice to the company.

allows this court to cure what I may say is merely a technical error which does no injustice to the respondents. In view of the above I will allow an extension of time to the petitioner to reswear an affidavit to verify the facts and the filing and serving of such affidavit before the hearing of this petition. The Company is of course entitled to costs and I do order that costs of the proceedings up to the date of this judgement shall be paid by the petitioner to the Company.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.; Francis Nathar & Co.*

PUBLIC PROSECUTOR v. LAU HUI TECK

[R. Cr. J. (Chong Siew Fai J.) September 3, 1987]
[Sibu – Criminal Revision No. 2 of 1987]

Criminal Procedure – Plea of guilt – Withdrawal of – Same magistrate – Whether magistrate functus officio.

The accused was charged with the offence of housebreaking by night in order to commit theft. He pleaded guilty to the charge, admitted the facts given by the prosecution and was convicted.

Thereafter, after an adjournment, the accused wanted to withdraw his plea of guilt. The learned trial magistrate, however, considered himself *functus officio* by reason of the fact that he had, on the admission of the accused as to the facts outlined by the prosecution, found the accused guilty and convicted him of the offence charged.

The issue before the court was whether on the facts and circumstances of the case, the learned trial magistrate was *functus officio* in that he was powerless in allowing the change of the plea from that of guilty to one of "not guilty".

Held: on the authorities, the learned trial magistrate in the instant case was not *functus officio* and had the discretionary power to allow the change of the plea to one of not guilty.

Cases referred to:

(1) *Abdul Mormin* v. *Public Prosecutor* [1939] M.L.J. 323.

(2) *Public Prosecutor* v. *Sam Kim Kai* [1960] M.L.J. 267.

(3) *S.* v. *Recorder of Manchester* [1971] A.C. 481 H.L.

(4) *R.* v. *McNally* [1954] 2 All E.R. 372.

(5) *R.* v. *South Sefton Justices, ex p. Rabaca* (1986) *Times*, February 20.

CRIMINAL REVISION.

Parties did not appear.

Cur. Adv. Vult.

Chong Siew Fai J.: This Sibu Magistrates' Court Criminal Case No. 79/87 comes before me by way of revision as a result of a letter from the learned trial magistrate. Upon perusal of the notes of proceedings, I do not consider it necessary to hear either party to the case.

The facts giving rise to this revision are short and simple. The accused, who was then unrepresented, was charged with the offence of housebreaking by night in order to commit theft. He pleaded guilty to the charge, admitted the facts given by the prosecution and was convicted. He then pleaded in mitigation. As the prosecuting officer required time to obtain his record of previous convictions, the case was adjourned to another date.

On the adjourned date, the accused was represented by counsel who applied for an adjournment, indicating that his client would withdraw the plea of guilty and that he needed time to submit the law on the point of withdrawal of the plea. The case was further adjourned.

At the resumption of the hearing, counsel for the defence submitted on question of law and used an affidavit made by the accused. The prosecuting officer did not object to the application for withdrawal of the plea. I find it unnecessary here to deal with the contents of the affidavit save saying that the learned trial magistrate, after hearing counsel, appeared inclined to allow the withdrawal of the guilty plea on the apparent grounds that the accused, as stated by himself, could have failed to fully understand the charge owing to confusion and scare after a five-day remand, and that the evidence of entry necessary to constitute the alleged offence was lacking. However, the learned trial magistrate considered himself *functus officio* by reason of the fact that he had, on the admission of the accused as to the facts outlined by the prosecution, found the accused guilty and convicted him of the offence charged.